

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Restoration Order  
Issued to Alvin Thorstad

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Manuel J. Cervantes (ALJ) on November 22, 2011 at the Spicer City Council Chambers, Spicer, Minnesota. The record closed upon receipt of the parties' written closing arguments on December 12, 2011.

Jill Schlick Nguyen, Assistant Attorney General, appeared on behalf of the Department of Natural Resources (DNR). Daniel Mohs, Attorney at Law, appeared on behalf of Alvin Thorstad (Respondent).

**STATEMENT OF ISSUES**

1. Whether the DNR may enforce its Restoration Order requiring Respondent to allow the natural re-growth of cattails along the shoreline of his property on Norway Lake, Kandiyohi County, Minnesota.

2. If so, and the natural re-growth process does not occur by a date certain, may the DNR enforce that portion of the Restoration Order that requires Respondent to replant the cattails along the shoreline of his property on Norway Lake?

The ALJ finds that Respondent was advised on numerous occasions that a permit was required to remove the cattails from his shoreline property, that he did not obtain the required permit and he had the cattails removed, contrary to Minn. Stat. § 103G.615 and Minn. R. 6280.0250.<sup>1</sup> The ALJ concludes that the Restoration Order is enforceable against Respondent.

Based upon the record herein, the Administrative Law Judge makes the following:

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<sup>1</sup> Minnesota Statutes are cited to the 2010 Edition. Minnesota Rules are cited to the 2011 Edition.

## FINDINGS OF FACT

1. Respondent owns lakeshore property at 5162 189th Avenue Northwest, New London, Minnesota. This property has 170 feet of shoreline on Norway Lake, Public Waters Inventory No. 34025100.<sup>2</sup>

2. In May 2009, Respondent contacted DNR Hydrologist Ethan Jensen, Ecological and Water Resources Office, by telephone. Respondent inquired about a riprap project that he was interested in pursuing at his Norway Lake property. He was also interested in removing the cattails from his shoreline. Respondent contended that there were no cattails on his shoreline prior to 2008.<sup>3</sup>

3. On May 27, 2009, Jensen visited the property; he assessed the situation, and took photographs.<sup>4</sup> The photos show established cattails growing along Respondent's shoreline.<sup>5</sup> Apparently, Jensen did no further follow-up on Respondent's inquiry.<sup>6</sup>

4. The next contact between Respondent and Jensen occurred one year later in May 2010. Jensen visited Respondent's property on or about May 25, 2010. He was joined by Eric Van Dyken, Assistant County Zoning Administrator, Kandiyohi County Environmental Services Office. The trio discussed Respondent's proposed shoreline alteration project and the cattail removal proposal.<sup>7</sup>

5. In discussing the riprap project, Respondent proposed adding more riprap material along the shoreline and adding black dirt to level the area near the shoreline to make mowing the lawn easier. Both Jensen and Van Dyken advised Respondent that a permit for the project would be required but, given the current site conditions at the property, a permit would likely be denied. Jensen did not see any significant shoreline erosion that would require a significant riprap project. Jensen observed that the cattails along Respondent's shoreline in 2010 were slightly denser than in 2009.<sup>8</sup>

6. Jensen also explained that his jurisdiction extended to shoreline alteration projects, but not cattail removal. He told Respondent that Craig Soupir, DNR Fisheries Habitat Specialist, would need to address his proposal to remove cattails.<sup>9</sup>

7. Several days after the site visit, Jensen contacted Respondent by phone and gave him Soupir's phone number. He reminded Respondent that any cattail

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<sup>2</sup> Exs. 1 and 4.

<sup>3</sup> Jensen and Thorstad Testimony (Test.).

<sup>4</sup> Jensen Test.

<sup>5</sup> Exs. 11 and 12, photos taken by Jensen (2009); Exs. 16 – 22, photos taken by Soupir (2010).

<sup>6</sup> Exs. 2 and 30.

<sup>7</sup> Jensen, Van Dyken and Thorstad Test.

<sup>8</sup> Jensen Test.

<sup>9</sup> *Id.*

removal or alteration would require a permit from Soupir's office, the Regional Aquatic Plant Management Office.<sup>10</sup>

8. Respondent contacted Soupir by telephone shortly thereafter in May 2010. Respondent told Soupir that the cattails along the shoreline "looked terrible" and he wanted to remove them. Soupir explained to Respondent that shoreline erosion was an issue on Norway Lake, that cattails served a vital function of buffering against erosion, and that a permit to remove them would be required. Soupir agreed to send Respondent an application and informational packet.<sup>11</sup>

9. On June 15, 2010, Respondent submitted an application requesting a permit to control cattails along the 170 feet of his shoreline and extending 12 feet into the lake.<sup>12</sup> Soupir was responsible for this permit review which required a site visit.<sup>13</sup>

10. On July 20, 2010, Soupir and Jensen conducted a site visit at Respondent's property. Soupir noted an extensive stand of cattails along Respondent's property, except for a 15-foot width area where Respondent's dock stood. Soupir also observed that it would take "a lot more than a year, to have that kind of growth. That's a pretty large stand of cattails emerging there." Jensen observed that a large amount of riprap material had been added to the upper part of Respondent's shoreline and that cattails had been bent over or flattened by machinery during the installation of the riprap material.<sup>14</sup>

11. Respondent contended that the cattails on his property were floating bogs. Soupir described a floating bog as dead organic material held together by live plants setting on the substrate or floating on the water column. If a bog is setting on the substrate, the organic mass and roots can be seen sitting on the sand.<sup>15</sup> The cattails along Respondent's shoreline were not floating bogs.<sup>16</sup>

12. Soupir noted that there was a band of cattails that formed a fringe around the south bay of the lake.<sup>17</sup> Soupir opined that because of the property's location on a shallow bay and a significant distance from the lake's opposite side, Respondent's property could be subjected to significant erosion if the cattails were removed. Soupir took photos of the area during the inspection.<sup>18</sup>

13. Soupir opined that there were no cattails on Hatlestad's property, Respondent's immediate neighbor to the west, because Hatlestad permitted his cattle to roam freely to and from the lake, thereby impeding cattail growth. Conversely,

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<sup>10</sup> *Id.*

<sup>11</sup> Soupir Test., Ex. 5.

<sup>12</sup> Ex. 1.

<sup>13</sup> Soupir Test.

<sup>14</sup> Jensen Test.

<sup>15</sup> Soupir Test., Exs. 28 and 29.

<sup>16</sup> Soupir Test., Exs. 11, 12 (2009) and 18 (2010).

<sup>17</sup> Soupir Test., Ex. 13.

<sup>18</sup> Soupir Test., Exs. 13 – 23.

Respondent's shoreline had cattails because he had no cattle to impede the growth of the cattails and they emerged naturally.<sup>19</sup> As to the absence of cattails from Respondent's neighbors to the east, Soupir stated that it was his opinion that there had been cattails present at one time but they were probably harvested as those properties were developed.<sup>20</sup> Given the extensive riprap along those properties, it is likely that there are significant erosion issues there.<sup>21</sup>

14. Soupir explained that cattails provide cover to birds, animals, and fish, but its primary function along the shoreline is to break up waves as they come across a lake, dissipating the waves' strength so as to inhibit the disturbance of the substrate and prevent erosion. Erosion is detrimental to a lake because the earthen material it breaks up at the shoreline contains nutrients which falls into the lake and can cause water degradation, leading to the loss of fish and other wildlife.<sup>22</sup>

15. Approximately one week later while attending to several new projects in Respondent's area, Jensen observed that Respondent's cattails had been removed.<sup>23</sup>

16. On August 4, 2010, Jensen, Van Dyken, and Jim Steffen, DNR Conservation Officer, conducted another site visit of Respondent's property. Conservation Officer Steffen has broad law enforcement responsibilities including enforcement of fish and game regulations, recreational vehicle and boat laws, aquatic vegetation removal regulations, and other duties.<sup>24</sup>

17. Steffen observed that "fresh work" had been done at the property. After an extensive conversation with Respondent, he concluded that Respondent was "[t]humbing his nose at the process" and expected that things would be done his way without regard to the rules. Steffen tape recorded his conversation with Respondent on August 4, 2010, as he often does when suspected violations of the law occur.<sup>25</sup>

18. Respondent told his contractor, Neal Stai, to remove the cattails from his shoreline. The following is an excerpt from the tape-recorded transcript:

Thorstad: Neal then he said, well I hate to do that Roger. I said, well Neal you have a choice, either you do it or I'll get somebody else to do it. These cattails are gonna go.

Steffen: Well you put Neal in a good position. I guess he obviously, or he put himself there as well. He'll get charged too on this.

Thorstad: I said, I'll pay his bill, I told him that.

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<sup>19</sup> Soupir Test., Exs. 14 and 23.

<sup>20</sup> Ex. 12

<sup>21</sup> Soupir Test.

<sup>22</sup> Soupir Test.

<sup>23</sup> Jensen Test.

<sup>24</sup> Steffen Test.

<sup>25</sup> *Id.*

Steffen: You told him before you removed them that you would pay his bill?

Thorstad: That's right.

Steffen: O.K.

Thorstad: If there is any penalty, I'll pay for it.

\* \* \* \* \*

Thorstad: He [Stai] also said, do you have a permit? And I said, no. He said, well you shouldn't take them out. And then I told him just go ahead and take them out.<sup>26</sup>

19. In justifying his action, Respondent asked Stai, "why should my place look like [expletive] here when everyone else has a nice shoreline?"<sup>27</sup>

20. The local officials informed Respondent that he violated the state and county permit requirements by altering the shoreline and removing the cattails and that the state would be taking an enforcement action against him for the cattail removal. He was also informed that the County had jurisdiction over the riprap alteration action because the majority of the riprap project extended on the landward side of the shoreline, above the ordinary high water mark.<sup>28</sup> Jensen took additional photos of the property.<sup>29</sup>

21. On August 17, 2010, the DNR issued an after-the-fact permit allowing Respondent to control cattails in a 15-foot width channel from the shore line to open water for boat access and recreational purposes.<sup>30</sup> Respondent's dock occupies the channel. In the cover letter, DNR also indicated that it would issue a restoration order to Respondent requiring him to restore the cattails along the remainder of his shoreline.<sup>31</sup>

22. On December 10, 2010, the DNR issued Respondent a Restoration Order. The Restoration Order included the following:

*1. You shall accomplish restoration by doing the following:*

*a) Allow natural re-growth of aquatic vegetation below the Ordinary High Water Level (OFIWL) within the destroyed area described*

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<sup>26</sup> Ex. 30, Transcript at 16.

<sup>27</sup> Ex. 2.

<sup>28</sup> *Id.*

<sup>29</sup> Exs. 24, 25.

<sup>30</sup> Ex. 4.

<sup>31</sup> Ex. 3.

*above and in attachments, except for the 15 feet in width permitted channel to open water.*

- b) If the Emergent Vegetation has not naturally re-established by September 1, 2011 to an average stem density of roughly 3-7 stems per square foot as indicated in photo's [sic] in the attachments to this restoration order, you are required to replant or hire a contractor to replant or transplant cattails, as described in Attachment B. You will be informed in writing whether replanting is necessary.*
- c) If planting is necessary, a DNR Permit to Collect and Transplant Aquatic Vegetation must be obtained from the Regional DNR Fisheries Office at 261 Hwy 15 South, New Ulm MN 56073 and aquatic vegetation shall be planted or transplanted only in the manner described in Attachment A by July 1, 2012. The plants can be restored by either of 2 options: Option 1) purchased at an aquatic plant nursery and planted by you or a contractor; or Option 2) transplanted from a DNR approved site, if a suitable site is available, by an approved contractor. Any planting within or removal of aquatic vegetation from public waters requires a DNR Permit to Plant or Transplant Aquatic Vegetation. If planting is necessary, it may take multiple planting efforts to achieve pre-violation densities.*
- d) If planting is necessary, mail a copy of any invoices for plants or labor to DNR Fisheries Habitat Specialist, 261 Hwy 15 South, New Ulm MN 56073 as evidence of planting progress and/or completion.*
- e) In any case, the Emergent Vegetation at the site on Norway Lake adjacent to 5162 189th Ave NW, New London, MN must be restored to pre-violation conditions by September 1, 2012.*

*2. You must contact Craig Soupir, Fisheries Habitat Specialist, at (507) 359-6046 with any questions you may have and prior to starting and after completing the restoration. You will be issued a certificate of satisfactory restoration upon successful completion.*

*3. This Order may be amended to order replacement of destroyed vegetation at a future time if all efforts for restoration are exhausted.*

23. On April 1, 2011, Respondent requested a contested case hearing to review the DNR's Restoration Order.

Based upon the foregoing facts, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Natural Resources have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 103G.251.

2. The Department of Natural Resources gave proper and timely notice of the hearing and has complied with all procedural requirements of law and rule.

3. Relative to public waters, it is Minnesota's policy to "conserve and use water resources of the state in the best interest of its people, and to promote the public health, safety, and welfare ...."<sup>32</sup>

4. Respondent's property has 170 feet of shoreline abutting Norway Lake, Public Waters Inventory No. 34025100 and, as such, is protected public water.<sup>33</sup>

5. Minn. Stat. § 103G.615, subd. 3, reads:

The commissioner shall, by rule, prescribe standards to issue and deny permits under this section. The standards must ensure that aquatic plant control is consistent with shoreland conservation ordinances, lake management plans and programs, and wild and scenic river plans.

6. Minn. Stat. 103G.615, subd. 4, reads:

(a) The commissioner may make findings and issue an order to a person to stop the illegal gathering, harvesting, planting or transplanting, or destroying of aquatic vegetation or organisms in public waters.

(b) In the same or a separate findings and order, the commissioner may require restoration or replacement of any emergent or floating leaf aquatic vegetation lost as a result of the illegal activities, to the condition existing before the illegal activities were undertaken. An order for restoration or replacement must state with specificity the work that is necessary to comply with the order and must specify a date by which the work must be completed.

7. DNR is authorized to issue permits to:

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<sup>32</sup> Minn. Stat. § 103A.201.

<sup>33</sup> Exs. 1 and 4; Minn. Stat. § 103G.005, subd. 15.

- (1) gather or harvest aquatic plants, or plant parts, other than wild rice from public waters;
- (2) transplant aquatic plants into public waters;
- (3) destroy harmful or undesirable aquatic vegetation or organisms in public waters under prescribed conditions to protect the waters, desirable species of fish, vegetation, other forms of aquatic life, and the public.<sup>34</sup>

8. Respondent admitted to Steffen, Jensen, and Van Dyken that he knew it was wrong to remove the cattails without a permit and ordered their removal notwithstanding.<sup>35</sup>

9. By removing 170 feet of cattails from the shoreline of his property without a permit, the Respondent violated Minn. Stat. 103G.615, subd. 1 and Minn. R. 6280.50, subp. 2.

10. In a permit application, as well as in a contested case proceeding regarding whether an applicant is entitled to an after-the-fact permit, the applicant has the burden of providing that the proposed project is “reasonable, practical, and will adequately protect public safety and promote the public welfare.”<sup>36</sup>

11. Minn. R. 6280.0250, subp. 3, reads,

Permits for the control of emergent and floating-leaf aquatic plants will not be issued unless the commissioner determines sufficient justification exists. The commissioner will consider the relevant criteria in subpart 3a and balance the reasonable needs of riparian owners to gain access and use public water against the need to protect emergent and floating-leaf aquatic plants so that the integrity and value of the aquatic plant community is maintained.

12. Minn. R. 6280.0250, subp. 3a, in relevant part, reads,

The commissioner may issue APM [Aquatic Plant Management] permits for public waters to provide riparian access, enhance recreational use, control invasive aquatic plants, manage water levels, and protect or improve habitat. The following criteria shall be considered to determine if an APM permit should be approved or denied and how much control or harvest to allow under an APM permit:

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<sup>34</sup> Minn. Stat. § 103G.615, subd. 1.

<sup>35</sup> Ex. 30 at 16.

<sup>36</sup> Quoting *In the Matter of the Alteration of the Cross Section of Spring Brook by Elden and Dorothy Brant Without a Permit From the Commissioner of Natural Resources*, Unpublished Opinion, 2001 WL 50924 (Minn. App.); Minn. Stat. § 103G.315, subd. 4(a) and (b).



- A. the presence of aquatic plants or nuisances that are interfering with a permit applicant's ability to use watercraft, swim, or engage in other traditional recreational uses;
- B. the habitat, water quality, and erosion control value of the aquatic plants subject to the proposed permit;
- C. the extent of shoreline development on the water body subject to the proposed permit and potential for aquatic plant control to result in cumulative impacts to habitat and water quality;

\* \* \* \* \*

- E. whether the water body subject to the proposed permit is a wetland or a shallow lake or bay that naturally supports abundant aquatic plants;
- F. the prevalence of soft bottom types that could result in turbidity or changes to the cross-section of the bottom if aquatic plants are disturbed or removed ....

13. Respondent was granted a limited after-the-fact permit to harvest 15 feet of cattails surrounding his dock. Respondent did not demonstrate that he was entitled to an after-the-fact permit to remove 170 feet of cattails because their removal was not necessary for the provision of recreational access to the lake.

14. Aquatic Plant Management permits are not issued for aesthetic purposes only.<sup>37</sup>

15. The DNR considered the relevant factors of Minn. R. 6280.0250, subp. 3a, and demonstrated its basis to deny an after-the-fact permit for the removal of 170 feet of cattails.

16. The Respondent did not meet his burden of providing that the proposed cattail project was “reasonable, practical, and would adequately protect public safety and promote the public welfare.”<sup>38</sup>

17. The DNR’s Restoration Order is appropriate.<sup>39</sup>

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<sup>37</sup> Soupir Test.; Minn. R. 6280.0250, subp. 4, C.

<sup>38</sup> *In the Matter of the Alteration of the Cross Section of Spring Brook by Elden and Dorothy Brant Without a Permit From the Commissioner of Natural Resources*, Unpublished Opinion, 2001 WL 50924 (Minn. App.); Minn. Stat. 103G.315, subd. 4 (a) and (b). All citations to Minnesota Statutes reference the 2010 Edition.

<sup>39</sup> Minn. Stat. 103G.615, subd. 4 (a) and (b).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

**IT IS HEREBY RESPECTFULLY RECOMMENDED** that Restoration Order issued by the Commissioner of Natural Resources be **AFFIRMED**.

Dated: January 30, 2012

/s/ Manuel J. Cervantes  
MANUEL J. CERVANTES  
Administrative Law Judge

Reported: Digitally Recorded, no transcript prepared

### **NOTICE**

This report is a recommendation, **not** a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained herein. Pursuant to Minn. Stat. §14.61, the final decision of the Commissioner of Natural Resources shall not be made until this report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by the Report to file exceptions and present argument to the Commissioner of Natural Resources. Parties should contact Tom Landwehr, Commissioner, Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155-4040, telephone 651-259-5022, to ascertain the procedure for filing exceptions or presenting argument.

Pursuant to Minn. Stat. §14.62, subd. 1, the Agency is required to serve a copy of its final decision upon each party and the Administrative Law Judge by first class mail.

### **MEMORANDUM**

Respondent's testimony and that of his witnesses, describing the presence of the cattails along Respondent's shoreline as floating bogs, is not credible. The 2009 and 2010 photographs in evidence, coupled with the testimony of the DNR's witnesses, make clear that the cattails at issue had been established for years. Stai's reluctance to remove the cattails is telling because both he and Respondent knew that a permit was required and what they were about to do -- remove the cattails -- was unlawful. If the rim of cattails along the shore were bogs, it would have been self-evident. Instead, Respondent admitted that he chose the tactic of asking for forgiveness, after the fact, rather than

getting a final decision on his application before he acted.<sup>40</sup> The Department's Order is fully supported by the facts and law in this case.

**M.J.C.**

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<sup>40</sup> Ex. 30 at 17.